In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1310

THOMAS L. HOUCHINS, Sheriff of the County of Alameda, California,

Petitioner,

vs.

KQED, INC., et al.,

Respondents.

Petitioner's Opening Brief

RICHARD J. MOORE,
County Counsel of the
County of Alameda,
State of California

KELVIN H. BOOTY, JR.
Senior Deputy County Counsel

ADAM SETH FERBER
Deputy County Counsel
Administration Building
1221 Oak Street
Oakland, California 94012

Attorneys for Petitioner

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

Page

Table of Authorities .....

Jurisdiction 2

Constitutional Provision Involved 2

Question Presented for Review 2

Statement of the Case 2

A. Mail 5

B. Visiting 6

C. Telephone 7

D. Public Tours 7

Summary of the Argument 12

Argument 12

I. KQED Has No Greater Right of Access to Information Than the Right Possessed by the General Public .. 12

A. The District Court Erred by Extending Greater Rights of Access to Santa Rita to the Press Than Those Accorded the General Public 15

B. The Opinion of the Court of Appeals in the Instant Case Misapprehends the Well-Established Rules Regarding Equality of Access 16

II. The District Court Erred in Failing to Balance the Rights of Both the Press and Public Against Those of the Sheriff as a Predicate to Issuance of its Order 19

A. The District Court Erred by Unduly Involving Itself in Problems of Prison Administration Not Amenable to Solution by Judicial Decree 21

Page

B. The District Court Erred in Failing to Consider Alternative Means of Prisoner-Public-Press Communication 23

C. A Complete and Proper Balancing of the Rights of Petitioner with Those of the Press and General Public Requires the Conclusion That the Policies Challenged in the District Court Were Proper and Should Not Have Been Disturbed 26

Conclusion 28

Appendix

TABLE OF AUTHORITIES

CASES Pages

Adderley v. Florida, 385 U.S. 39 (1966) 20, 27

Asociacion de Trabajodores etc. v. Green Grant Co., 518 F.2d 130 (3rd Cir. 1975) 27

A Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975) 20

Baxter v. Palmigiano, 425 U.S. 308 (1976) 22

Branzburg v. Hayes, 408 U.S. 665 (1972) 13, 17

Brenneman v. Madigan, 343 F.Supp. 128 (N.D.Cal 1972) .. 9

Bullock v. Mumford, 509 F.2d 384 (D.C. Cir. 1974) 20

Estes v. Texas, 381 U.S. 532 (1965) 13, 17, 27

Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974) 20

In The Matter of United Press Assns. v. Valente, 308 N.Y. 71, 123 NE2d 777 (1954) 13

Jones v. North Carolina Prisoners' Labor Union, Inc., ... U.S. ....., 45 U.S.L.W. 4820 (1977) 22

Kleindienst v. Mandel, 408 U.S. 753 (1972) 24

Mazzetti v. United States, 518 F.2d 781 (10th Cir. 1975) 14, 27

Meachum v. Fano, 427 U.S. 215 (1976) 22

New York Times Co. v. United States, 403 U.S. 713 (1971) 13

Pell v. Procunier, 417 U.S. 817 (1974) 5, 6, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 27

Preiser v. Rodriguez, 411 U.S. 472 (1975) 25

Procunier v. Martinez, 416 U.S. 396 (1974) 21, 22

Rideau v. Louisiana, 373 U.S. 723 (1963) 14, 17

Pages

Saxbe v. Washington Post Co., 417 U.S. 843 (1974) 5, 13, 15, 16, 17, 19, 27
Sheppard v. Maxwell, 384 U.S. 333 (1966) 13, 17, 27

Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958) 13, 14, 27
Trimble v. Johnston, 173 F.Supp. 651 (D.D.C. 1959) 14, 17, 27

United States v. Farinas, 448 F.2d 1334 (2nd Cir. 1971) 26
United States v. O'Brien, 391 U.S. 367 (1968) 20, 27

Wolff v. McDonnell, 418 U.S. 539 (1974) 22
Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1972) 27

Zemel v. Rusk, 381 U.S. 1 (1965) 13, 17

LAW REVIEW ARTICLE

Stewart, "Or of the Press", 26 Hast. L. Jour. 631 (1975) .. 14

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1310

THOMAS L. HOUCHINS, Sheriff of the County of Alameda, California,
Petitioner,

vs.

KQED, INC., et al.,
Respondents.

Petitioner's Opening Brief

This case is being heard upon writ of certiorari to the Court of Appeals for the Ninth Circuit. The majority and concurring opinions of the Court of Appeals in this case are reported in 546 F.2d 284 (9th Cir. 1976); those opinions are reproduced in the Petition for a Writ of Certiorari. The Court of Appeals affirmed an unreported decision of the United States District Court for the Northern District of California, granting a preliminary injunction. The District Court's preliminary injunction and that court's accompanying memorandum and order are reproduced in the Appendix to the briefs (hereinafter abbreviated "A"), 66-71.

JURISDICTION

The judgment of the Court of Appeals was dated and filed November 1, 1976. Petitioner Sheriff Houchins ("Sheriff") filed a petition for rehearing, which was denied. The Sheriff applied to this Court for a stay pending review on certiorari, and on January 28, 1977, Mr. Justice Rehnquist granted the stay. Mr. Justice Rehnquist's opinion with respect to that application and stay is reprinted in Appx. to the Petition for a Writ, pp. 35-40. The Petition for Certiorari was filed in this Court on March 22, 1977, and certiorari was granted on May 23, 1977.

The statutory provision conferring on this Court jurisdiction to review the judgment in question is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the First Amendment, reading in relevant part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

as made applicable to the States by the Fourteenth Amendment.

QUESTION PRESENTED FOR REVIEW

The question presented for review is, did the District Court err in granting a preliminary injunction requiring the Sheriff to grant to Respondent KQED, Inc. ("KQED") and to other representatives of the news media greater access to the Sheriff's county jail facility than the Sheriff grants to members of the public at large?

STATEMENT OF THE CASE

This case involves the access of the news media to the inmates and premises of a county jail. As will be seen in detail hereafter, members of the general public, including the press, may tour the Alameda County jail facilities at Santa Rita on one of the semi-

monthly scheduled tours, and may communicate with the inmates in various other ways. However, the members of the public may not photograph the institution or inmates, and may not interview inmates, in the course of any tour. As will be further seen, media representatives have greater access to the facility and the inmates than do members of the public, but media representatives, like members of the public, may not photograph the institution or inmates, and may not interview inmates, in the course of the tour.

The complaint was filed in the District Court on June 17, 1975. (A.3) Plaintiffs invoked the court's jurisdiction pursuant to 28 U.S.C. § 1343(3), stating that the suit was authorized by 42 U.S.C. § 1983. The plaintiffs were KQED, Inc. and the Alameda and Oakland branches of the NAACP. KQED, Inc. is a non-profit corporation engaged in educational television and radio broadcasting. The NAACP plaintiffs are unincorporated associations (and the local branches of the national NAACP), whose members reside in Alameda and Oakland in Alameda County, California. Defendant Houchins was and is the Sheriff of Alameda County. (A.4) He has been employed by the Alameda County Sheriff's Department for thirty years, including five as commanding officer at Santa Rita. Reporter's Transcript ("R.T.") 80. He was the Assistant Sheriff (or Undersheriff) for five years, and was elected Sheriff effective January 1, 1975. (A.80) As Sheriff he has general supervision and control of all Alameda County jail facilities, including those located at Santa Rita.[1] (A.29) He does not control the health services for inmates. (R.T. 23-24).

In its complaint KQED alleged that it had asked the Sheriff for permission to inspect the maximum security portion of Santa

---

1. Statistics in evidence with respect to this jail indicate that sentenced inmates are incarcerated, on the average, for thirty-two days, and that pre-trial detainees are incarcerated, on the average, for ten days. Defendant's Exh. F, R.T. 84-85. The nature of the inmate population has changed radically in recent years, in that the inmates are more difficult to handle. R.T. 95-97.

Rita, a building commonly referred to as Greystone, but that the Sheriff had refused the request. (A.5) KQED also moved for the issuance of a preliminary injunction enjoining the Sheriff, during the pendency of the action, from excluding KQED from the premises. (A.7-8) The Sheriff filed an opposition to the motion (part of which is reproduced at A. 29-59, and the remainder of which is in an unreproduced document accompanying the clerk's transcript), and an answer. (A.21) In the answer, the Sheriff alleged that if KQED were permitted to enter, then all other media representatives would have to be given similar privileges; that such spasmodic tours would be unduly disruptive to the operations of the facility; and that KQED, other media representatives, and the general public could view the facilities on the then-planned public tours. (A. 22-28) The Sheriff had told the foregoing to KQED in response to its request for admission to the facility. (A. 22, R.T. 186)

Further memoranda and affidavits were submitted to the District Court. An evidentiary hearing was held on November 6 and November 10, 1975. (Clerk's Transcript—"C.T."—52-55) On November 20, 1975, the District Court issued its preliminary injunction, A.70-71, together with its memorandum and order explaining the same. (A.66-70) The District Court determined (1) that press [media] access must be allowed greater than that afforded the general public; that is, the press must not be prevented from providing "full and accurate coverage of conditions", and may not be denied access to any of the facilities at reasonable times and hours; (2) that such access must at least include the use of cameras and sound equipment, and inmate interviews; and (3) that access may be restricted only in the event of jail tensions or other dangerous circumstances. (A.71)

On December 4, 1975, the Sheriff appealed to the Court of Appeals for the Ninth Circuit. (C.T. 77) On the same day the Sheriff sought and was denied a stay of the preliminary injunction in the United States District Court pending determination of the matter on appeal. (C.T. 76) The Sheriff then applied on the same day for a stay in the Court of Appeals. Circuit Judge Duniway granted immediate relief (A.1), and on December 24, 1975, the Court of Appeals, per Chambers and Snead, Circuit Judges, granted the stay, saying

> Upon due consideration, the petition for stay of injunction pending appeal is granted. The injunction appears to exceed the requirements of the First Amendment as interpreted in *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay. (Appendix to this Opening Brief)

A different panel of the Court of Appeals heard and decided the case, and the opinion of that court was filed on November 1, 1976. The complete text of the three opinions is printed in the Appendix to the Petition for a Writ of Certiorari filed with this Court on March 22, 1977. The subsequent history of the case has previously been related.

KQED did not allege, and the District Court did not find, that the access to the inmates and facilities afforded the members of the public at large was in any way inadequate. However, in view of the legal issue presented, it remains necessary to discuss the access afforded the members of the public.

A. Mail

The rules of conduct for inmates housed under conditions of minimum security are reproduced at A. 31-43, and for those housed in the maximum security facility, Greystone, are at A. 43-51. These rules included provisions with respect to mail. For inmates housed in the maximum security area, for example, the mail rules, A. 48-50, together with implementing instructions to staff, A. 50-52, may be summarized as follows: there is no limita-

tion on the number of letters an inmate may send or receive, nor on the length of letters; there is no limitation on the persons to or from whom letters may be sent or received. Letters to and from members of the public (including media representatives) would be inspected for contraband, but would not be read. Inmates without funds for pens, paper, and stamps would receive the same free of charge.

B. Visiting

Sentenced inmates may be visited from 11:30 a.m. to 2:30 p.m. on Sundays. There is no age limitation on visitors, except that a visitor under eighteen years of age must be accompanied by an adult. There are no lists of approved visitors.[2] Except for restrictions with respect to those visitors who have been previously confined in penal institutions, there are no limitations with respect to the identity of the visitor. (A. 41, minimum security, A. 47-48, maximum security.) Unless a media representative fell within these two limitations, any reporter could visit any inmate.

Pre-trial detainees may be visited on Sundays from 11:30 a.m. to 3:30 p.m., and on Tuesdays, Wednesdays and Thursdays from 6:00 p.m. to 8:00 p.m. (A. 30) In other respects the pre-trial detainees are subject to the same restrictions as are sentenced inmates, except, of course, that counsel may visit at any reasonable time.

Apart from visitation, pre-trial detainees may be interviewed by a media representative (but not by a member of the general public), if the written consents of the detainee, counsel, and the

2. This reflects an even more expansive policy than was approved in *Pell v. Procunier,* 417 U.S. 817, 824-825 (1974), where the Court found that the visitation policy in San Quentin, permitting only limited visits from members of the inmates' families, the clergy, their attorneys, and friends of prior acquaintance, did not seal the inmate off from personal contact with those outside the prison.

court having jurisdiction have first been obtained. (A. 30) These interviews could be photographed or recorded. (R.T. 89) Similarly apart from visitation, sentenced inmates may be interviewed upon their release from the facility. The Sheriff has offered to inform the media representatives upon request of the time of departure from Santa Rita and expected arrival in Oakland of the release bus containing inmates being released. (R.T. 98) Interviews of released inmates could, it is submitted, be conducted in an atmosphere free from any real or imagined pressures, either from other inmates, on the one hand, or from the Sheriff's staff, on the other. No media representative has ever asked the Sheriff for this information, or taken advantage of this offer.[3]

C. Telephone

Inmates in the maximum security facility may make unmonitored, collect telephone calls without restriction, R.T. 46-47, when in the dayrooms. (The dayroom schedule is in Defendant's Exh. G, R.T. 102-105.) Inmates housed in the minimum security facility may place telephone calls through the social services officer. (A. 38) The telephone access by inmates housed elsewhere in the facility is not disclosed in the record.

D. Public Tours

Since shortly after assuming office in January, 1975, the Sheriff planed public tours of Santa Rita. (R.T. 80-81, 129-30) Indeed, at the time the complaint was filed KQED knew that the tours would commence. (A.23) The first tour was held on July 14,

3. In addition to speaking to the inmates themselves, media representatives could interview those who have frequent access to the facility. These include teachers in the various classes, A.38, R.T. 69-70, medical personnel, A.39-40, attorneys or investigators, R.T. 71, nonbadge employees, such as bakers, butchers, cooks, and the like, R.T. 73, or volunteer counselors from various religious groups, R.T. 31.

[redacted]. At first the tours took place monthly, A. 25, 52-53, and perhaps due to the novelty of the situation, waiting lists built up. Beginning in January, 1976, the tours have been held semi-monthly. The tours have also been expanded in size so that thirty persons may go on each tour. (R.T. 60, 82-83, and Houchin's Aff'd. of December 4, 1975, in Appx. to Opening Brief) That situation still obtains. Since January, 1976, there has been essentially no waiting list. (Letter of December 30, 1975, to Court of Appeals, in Appx. to Opening Brief)

The District Court found that the tourists come from all walks of life. (A. 68) The tourists are not screened in advance and may in fact simply arrive on the evening of the tour. (R.T. 68, 75) Media representatives may go on the public tours.

The tours cover virtually all of the facilities at Santa Rita. The District Court heard testimony illustrating in detail the route of the tour, and the interiors and exteriors of the buildings visited, including descriptions and photographs of the foregoing. (R.T. 9-57) Plans of the facility were admitted in evidence to illustrate the course of the tour, Def. Exh. A, B, and C, R.T. 10, and photographs were also admitted in evidence. (Def. Exh. D-1 through D-20, R.T. 11-12) (Those photographs are also offered for sale at a reasonable price to those taking the tour. R.T. 12) The witness described the course of the public tour, and used the plans and the photographs to illustrate his testimony. He indicated on the plans the places where the photographer was standing, and the direction the camera was pointing when the photograph was taken. The portion of the tour relating to Greystone, for example, is described in R.T. 41-57; the plan of Greystone is Exhibit C, and the photographs of Greystone are Exhibits D-13 through D-20. Almost all portions of Greystone are covered on the tour: its cells, dayr[illegible] exercise yard, kitchen, and dining halls. The tourists also see [illegible]'safety cell", R.T. 55, but do not see the disciplinary cells (which are virtually identical

to all other cells: the "discipline" consists of the removal of privileges, R.T. 66-67, 78).[4]

The tour was criticized for being scheduled, rather than on demand, R.T. 176-177, A. 62; for not permitting the interviewing of inmates and the photographing of inmates and the facilities during the tour, R.T. 174, A. 62; for not including the pre-trial detainee barracks commonly known as Little Greystone, R.T. 174-175, A. 61, on the tour (although the interior of that building is identical to that of the other barracks which are included, R.T. 26-30, 179, Def. Exh. D-8 and D-9); and for not having inmates on view, R.T. 180, A. 61. The photographs were criticized for not showing inmates in the cells,[5] and for not disclosing the fact that the cells are covered with a wire mesh over which there is a large open space with catwalks, and heating and lighting equipment. (Def. Exh. D-16 and D-17, R.T. 52-53, A. 61) The photographs of the Greystone dayrooms, D-14 and D-15, were criticized for not including views of the urinals, showers, toilets, or television monitors. (R.T. 176, A. 61) These criticisms were, of course, from the point of view of a media representative, as such, and not from the point of view of a member of the public. There was no evidence or argument that the tours

---

4. Greystone is the maximum security portion of the Sheriff's facility and was the only portion of the Santa Rita Rehabilitation Center involved in *Brenneman v. Madigan*, 343 F.Supp. 128 (N.D.Cal. 1972). After that decision was filed, extensive renovations and additions were made to Greystone, and programatic changes were made as well. As a result of those improvements (together with the County's assurances that it intended to proceed with the construction of new jail facilities) the *Brenneman* case was dismissed. R.T. 43, 49, 51, 55, 103-104, 107. The *Brenneman* case is referred to in footnote 1 of the opinion of the Court of Appeals in this case, 546 F.2d at 285, Appx. to Pet. for Writ, p. 2. In view of the comprehensive tour of the Greystone facility, the remark of the Court of Appeals in footnote 2 of its opinion, Appx. to Petition for Writ, p. 3, is inexplicable.

5. Only the Greystone portion of the facility consists of cells; the remainder of the facility consists of barracks with the exception of a few cells in the women's quarters. R.T. 41.

were inadequate in any way with respect to the public. No testimony whatever was presented by the NAACP plaintiffs or their members.

Testimony was presented on behalf of the Sheriff explaining why it was difficult to accede to KQED's request that the facility be available to the press on an unscheduled basis, and that such access permit interviewing of inmates and photographing of inmates and the facilities. Such a program would be extremely disruptive, for several reasons. During the tour the inmates must be locked in their cells or otherwise removed from contact with the visitors. (R.T. 44-45, 106) The facility runs on a tight schedule, involving very frequent moving of inmates. (R.T. 100-109, Def. Exh. G and H) Those movements include going to and from classes, R.T. 34, Def. Exh. E and D-11, meals, R.T. 34-37, work, and dayrooms and exercise yards, as well as movements to operate the facility and to transport pre-trial detainees to and from the courts. (Most of the courts are located a considerable distance away from Santa Rita.) Since the inmates must be removed from contact with the visitors while the visitors are present, the movements mentioned above come to a halt while the tour is in progress. (R.T. 102-109) The disruption not only consumes time and money, but also could result in angering the inmates (R.T. 100-101) making them more difficult to handle.

No interviewing or photographing of pre-trial detainees could be accomplished without their consent and the consent of their attorneys and the courts, R.T. 89; the difficulties involved in this aspect of the matter are compounded because one cannot identify a pre-trial detainee merely by looking at him or by determining where he is housed. (R.T. 89-92, 99) The photographing of sentenced inmates can lead to jealousies. (R.T. 90) For all inmates the potential for disciplinary problems is a danger not alleviated merely by obtaining the consent of the inmate being photographed or interviewed. (R.T. 92-93)

Photography presents additional problems in that there are security devices throughout the institution which may not be photographed. (R.T. 20, 48, 53, 56, 62-64, 86-88)

Close supervision is required by the Sheriff's personnel of anyone taking photographs or interviewing inmates. (R.T. 88, 112) Equipment brought on the premises must be searched. (R.T. 93-95)

Thus, the Sheriff concluded that visits could not be conducted on demand, or indeed on any basis other than a scheduled one. These scheduled tours for the public have previously been described; additional scheduled tours, exclusively for media representatives, permitting the use of cameras, but not the use of interviews, could also be accommodated. (R.T. 109-112, 116)

The District Court in its memorandum accompanying its preliminary injunction did not criticize in any way the access granted the public, as such, to the inmates or to the Sheriff's facilities (A. 68); indeed, the subject was apparently not even considered relevant.[6] Instead, the entire burden of the District Court's remarks was directed to a critique of the Sheriff's fears with respect to media entry, A. 69, and a comparison of his actions with the *media* policies of the San Francisco Sheriff and of the state authorities at San Quentin. (A. 68) (The District Court did not deal with the

---

6. Thus District Judge Pregerson, writing for the Court of Appeals, is patently incorrect when he asserts that:

> Implicit in the trial court's memorandum granting the preliminary injunctions [sic] is the finding that the First Amendment rights of both the public and the news media were infringed by appellant's restrictive policy. (546 F.2d at 286; Appx. to Pet. for Cert. p. 3)

On the contrary, there is no evidence that the District Court ever considered what the rights of the public were. KQED did not argue in its Motion for Preliminary Injunction that the public's rights were violated, and despite the fact that the Sheriff urged, in his Opposition, that the extent of the public's right of access was the central legal question, neither the District Court's memorandum nor its preliminary injunction addresses the point.

public access to San Quentin, which was much more limited than the public access to Santa Rita. See discussion pp. 24-25 below.) The District Court adjudged the Sheriff to have an inadequate media policy, and therefore enjoined him to develop an adequate media policy within the limits set forth in its memorandum and its preliminary injunction. The Court of Appeals affirmed.

SUMMARY OF THE ARGUMENT

KQED has no greater right of access to the Sheriff's facility, as a member of the press, than the right of access possessed by the general public. By issuing a preliminary injunction which accorded KQED and the press broader rights of access than those possessed by the public, the District Court acted improperly.

The District Court erred in failing to balance the rights of both the press and public against those of the Sheriff as a predicate to issuing its order. A proper balancing would have also included deference to Supreme Court admonitions against undue judicial involvement with prison administration, and consideration of alternative channels of communication flowing between the jail and the press and public.

Finally, the District Court erred in according insufficient weight to the Sheriff's interest in the internal administration and maintenance of security of the Santa Rita jail.

ARGUMENT

I. KQED Has No Greater Right of Access to Information Than The Right Possessed by the General Public.

Recent United States Supreme Court and Court of Appeals cases make it clear that the press has no constitutional right of access to information broader than that possessed by the general public. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution

does not, however, require government to accord the press special access to information not shared by members of the public generally . . . . That proposition finds no support in the words of the Constitution or in any decision of this court." *Pell v. Procunier*, 417 U.S. 817, 835-36; *Saxbe v. Washington Post Co. Inc.*, 417 U.S. 843, 850 (1974). "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)[7]; *New York Times Co. v. United States*, 403 U.S. 713, 728-730 (1971) (Stewart, J., concurring); *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 885 (3d Cir. 1958) (courtroom); *In the Matter of United Press Assns. v. Valente*, 308 N.Y. 71, 77, 123 NE2d 777, 778 (1954).

This rule has been applied in a variety of contexts. In *Branzburg v. Hayes, supra*, at 684-685, the Court enumerated some of them as follows:

> Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive sessions, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial jury.

See also *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (where the failure of a trial court to adopt stricter rules governing the use of the courtroom by newsmen resulted in a United States Supreme Court reversal of the state court conviction); *Estes v. Texas*, 381

---

7. At page 17 the Court held "The right to speak and publish does not carry with it the unrestrained right to gather information".

U.S. 532, 539 (1965) (where, in reversing a conviction which followed a trial in which television cameras and sound equipment were allowed in the courtroom, the United States Supreme Court observed that "Neither of these two amendments [First and Sixth] speaks of an unlimited right of access to the courtroom on the part of the broadcast media."); *Rideau v. Louisiana,* 373 U.S. 723, 726 (1963); *Tribune Review Publishing Company v. Thomas,* 254 F.2d 883 (3d Cir. 1958) (state court rule forbidding the taking of photographs in courtrooms or the vicinity of courtrooms upheld); *Trimble v. Johnston,* 173 F.Supp. 651, 656 (D.D.C. 1959) (freedom of press does not encompass right to inspect documents not open to members of public generally); *Mazzetti v. United States,* 518 F.2d 781, 783 (10th Cir. 1975); see also Stewart, "Or of the Press", 26 Hast. L. Jour. 631, 636 (1975)[8].

The most recent reiterations of the principle that the press right of access is no more than co-equal with the public's right of access are found in *Pell v. Procunier, supra,* and *Saxbe v. Washington Post Co., supra.* In *Pell* the Supreme Court reviewed challenges by California state prison inmates and professional journalists, under the First and Fourteenth Amendments, to the constitutionality of § 415.071 of the California Department of Corrections Manual. The challenged section provided that "Press and other media interviews with specific individual inmates will not be permitted." The media plaintiffs contended, inter alia, that members of the press have a constitutional right to interview any prison inmate who is willing to speak to them, absent a clear and present danger to prison security or another substantial correctional interest. Asserted as well was the right to gather news without governmental inter-

8. Mr. Justice Stewart observes: "There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. [Footnote omitted.] The public's interest in knowing about its government is protected by a guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."

ference, which right, it was argued, subsumed a right of access to sources of apparently newsworthy information. After stating the general rule that the First Amendment does not guarantee the press a constitutional right of access to information not available to the general public, the Court held that since § 415.071 did not deny the press access to sources of information available to members of the general public, the section did not abridge First or Fourteenth Amendment protections. 417 U.S. at 833-835. In *Saxbe* the Court reviewed a challenge to a similar section of the Policy Statement of the Federal Bureau of Prisons.[9] Observing that the policies of the Federal Bureau of Prisons regarding visitations to prison inmates did not differ significantly from the California policies considered in *Pell,* the Court found the two cases indistinguishable and reaffirmed the holding of *Pell.* 417 U.S. at 850.

A. THE DISTRICT COURT ERRED BY EXTENDING GREATER RIGHTS OF ACCESS TO SANTA RITA TO THE PRESS THAN THOSE ACCORDED THE GENERAL PUBLIC.

Based upon the foregoing authority, it is asserted that the District Court erred in issuing its preliminary injunction, A. 70-71, because the injunction extends to "KQED and responsible representatives of the news media" opportunities for access to Santa Rita which are more extensive than those afforded the general public. The injunction allows the press access to the jail at reasonable times and hours, as well as the right to use photographic and sound equipment and to interview individual inmates. The injunction permits access to be curtailed "for the duration of those limited periods when tensions in the jail make such media access dangerous". No mention is made, nor consideration given to the

9. Section 4b(6) of Policy Statement 1220.1A of the Federal Bureau of Prisons provided: "Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities."

general public. In the memorandum and order accompanying its preliminary injunction, A. 66-70, the court's misapprehensions of the holdings of *Pell, Saxbe* and related Supreme Court cases are amply demonstrated. Judge Carter observed "this Court reads *Pell* as standing for the proposition that a prison or jail administrator may curtail media access upon a showing of past resultant disruption or present institutional tensions." (A. 68) Together with his characterization, as dictum (A. 67), of the *Pell* holding that press and public access to jails are coextensive, the judge's observation appears to be the legal foundation for the injunction.

The District Court's construction of *Pell* is incorrect. As has been discussed, the language contained at pages 833-834 of *Pell* amounts to a review of the present judicial rule that the press right of access is limited to an extent equal to the right of the general public. The language is not dictum. 417 U.S. at 850. Rather, it is clear that the Supreme Court was using this reiteration of the rule as a basis for upholding the validity of § 415.071 by which rule the California Department of Corrections was limiting press access to prisoners.

And, as will be discussed more fully below, the District Court's consideration of KQED's rights as a representative of the press, without an accompanying evaluation of the rights of access to the Santa Rita facility afforded the general public, amounts to error. If the equality of access rules set forth in *Pell* and *Saxbe* are to have any substance, evaluation of press rights must necessarily include juxtaposition of such rights with those of the public.

B. THE OPINION OF THE COURT OF APPEALS IN THE INSTANT CASE MISAPPREHENDS THE WELL-ESTABLISHED RULES REGARDING EQUALITY OF ACCESS.

Similarly, scrutiny of the three opinions prepared in the Court of Appeals in the instant case, 546 F.2d 284, indicates that two of the judges, quite disingenuously, either misapprehend or ignore the holdings of *Pell, Saxbe,* and their predecessors, while the third

judge recognizes the validity of the holdings but declares that they are at odds with his personal beliefs. (These opinions are printed in the Appendix to the Petition for Certiorari.)

In his concurrence Judge Duniway states: ". . . [I] confess to having serious doubts about the result [in the instant case], not because I think it is wrong in principle, but because I have great difficulties in reconciling the result with the decisions in [Pell] and [Saxbe]. I think it is clear beyond the possibility of argument that the preliminary injunction from which the appeal is taken grants to KQED and other media greater access to the Santa Rita Jail than is granted to the public."

Judge Pregerson's opinion construed the holdings of *Pell* as "simply stat[ing] that the news media's constitutional right of access to prisons or their inmates is co-extensive with the public's right." As a pure proposition of law Judge Pregerson's construction is facially correct. *Pell* and *Saxbe* are the latest applications of a general rule of long standing that the press's right of access is not constitutionally broader or more pervasive than that of the general public. This rule has been stated in a variety of factual contexts, including access to foreign countries (*Zemel v. Rusk, supra*); access to scenes of a crime or disaster (*Branzburg v. Hayes, supra*); access to government documents (*Trimble v. Johnston, supra*); access to courtrooms (*Estes v. Texas, supra; Sheppard v. Maxwell, supra*); access to pre-trial detainees (*Rideau v. Louisiana, supra*); and access to prisons (*Pell v. Procunier, supra, Saxbe v. Washington Post Publishing Co. Inc., supra*) But Judge Pregerson fails to adhere to this stated principle: he says that "access needs of the news media and the public differ", and proceeds to attempt to justify a policy of noncoextensive access, contrary to what he has just stated the law to be.

Judge Pregerson also notes that: "Implicit in the trial court memorandum granting the preliminary injunction is the finding that the First Amendment rights of both the public and the news

media were infringed . . . ". The Judge concedes that "the memorandum does not explicitly mention the public's rights . . . ." Indeed, though KQED news personnel enjoy status as both news reporters and members of the general public, neither the District Court's memorandum and order (A. 66), nor the injunction itself (A. 70), extend rights of access to the general public that are coextensive with those extended to KQED news personnel. Further, the District Court's injunction does not grant to KQED a right of access to Santa Rita that, though different in manner, is "merely coextensive" with the access provided to the general public. The injunction permits KQED and other members of the news media access to the jail, including the Greystone portion, at all "reasonable times and hours." The injunction also permits the use of photographic and sound equipment as well as utilization of inmate interviews. Any fair and accurate reading of the injunction must disclose that it is addressed *solely* to the media, and allows the news media more time in and around the Santa Rita facility, access to the Greystone building, access to individual inmates for purposes of interviews, together with the opportunity to decide when, during reasonable hours, such access will be utilized and the opportunity to utilize both photographic and sound equipment. None of these rights is extended to members of the general public. Although KQED had the opportunity to challenge the Sheriff's policies as they applied to its staff members, as members of the general public, it did not do so; and the NAACP plaintiffs—members of the public—presented no evidence, and are not covered by the injunction. No finding, implicit or otherwise, is contained in the District Court's decision concerning the adequacy of access to Santa Rita afforded the general public.

Judge Hufstedler asserts that "*Pell* [does not] mean that regulations that are reasonable in controlling access to prisons and prisoners by the general public will always pass the First Amendment test when the same regulations are imposed on the news media."

Judge Hufstedler apparently bases her opinion not on the rights of access of the press and public as they have been examined by the Supreme Court and other courts in *Pell* and its predecessors, but rather upon her opinion on two points: first, what sort of information about prisons and prisoners the public should be informed of, and second, what is the "means by which the information is to be gathered." On the second point, the Judge is speaking of access, and her conclusion is that noncoextensive access is appropriate, contrary to the authorities previously discussed.

It is respectfully submitted that Judge Hufstedler used the wrong starting point in considering the relative First Amendment rights of press and public. As will be shown infra, the rights of access to government facilities which are not generally open to the public must, and should be, scrutinized by means of appropriate balancing tests. That such rights of access are the same for the media and for the public has been made clear in opinions of this Court, of lower courts, and of commentaries upon the state of the law on the subject made by a justice of this Court. The citizen is entitled to the same information as the reporter; stated differently, citizens may find things out for themselves, and are not compelled to have their news filtered through the channels of the media.

Based upon the foregoing it is therefore asserted that the decision of the Court of Appeals was improper and should be reversed.

II. The District Court Erred in Failing to Balance the Rights of Both the Press and Public Against Those of the Sheriff as a Predicate to Issuance of its Order

It has been demonstrated that due to its misconstruction of the holdings of *Pell*, *Saxbe*, and the cases from which they flow, the District Court erroneously extended disproportionate access to the Santa Rita jail facility to KQED. It is respectfully submitted as well that the District Court improperly undertook to balance

KQED's rights of access against the Sheriff's concerns, without balancing the general public's rights (which are the same as the media's).

In *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), the Supreme Court held "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." This holding has been widely followed. See, e.g., *Bullock v. Mumford*, 509 F.2d 384, 387 (D.C. Cir. 1974)[10]; *Garcia v. Gray*, 507 F.2d 539, 543 (10th Cir. 1974)[11]; *A Quaker Action Group v. Morton*, 516 F.2d 717, 725 fn.27 (D.C. Cir. 1975). General guidelines for evaluating challenges to government regulations asserted to limit free speech are also set forth in *United States v. O'Brien*, at pages 376-77 as follows:

> . . . [A] governmental regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendent freedoms is no greater than is essential to the furtherance of that interest. (See also *A Quaker Action Group v. Morton*, 516 F.2d 717, 725-26 (D.C. Cir. 1975).)

Respondents have cited no case, either before the District Court or the Court of Appeals, and we know of none, which authorizes a different evaluation of a governmental regulation to be applied to the press apart from the general public.

---

10. . . . [T]he Amendment does not protect behavior made unlawful by legitimate legislation or regulation, enacted for purposes unrelated to the suppression of free expression. *United States v. O'Brien*, 391 U.S. 367 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966).

11. . . . [I]t is well established that protected speech may be subject to reasonable limitation when important countervailing interests are involved.

And the failure of either the District Court or the Court of Appeals to give consideration to the Sheriff's policies as they affect the general public amounts to error.

A. THE DISTRICT COURT ERRED BY UNDULY INVOLVING ITSELF IN PROBLEMS OF PRISON ADMINISTRATION NOT AMENABLE TO SOLUTION BY JUDICIAL DECREE.

The balancing of purported free speech rights of both KQED and the general public must do more than merely recognize the special facts of this particular case; it also must include recognition of and deference to forceful admonitions by this and other courts against undue involvement in matters of prison administration. Such admonitions as those set forth in *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974), recognize that special problems inherent in prison administration do not lend themselves to solution by judicial decree. In *Procunier*, Mr. Justice Powell observed that despite the duty of a federal court to recognize valid constitutional claims arising from the context of a prison, "Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. [Footnote omitted.] More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible to resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of

which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. [Footnote omitted.] Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." See also *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974), *Baxter v. Palmigiano*, 425 U.S. 308 (1976), *Meachum v. Fano*, 427 U.S. 215 (1976).

The latest reiteration of this Courts' statements urging judicial deference to the reasonable decisions of prison administrators, even where such decisions impinge on some areas of free speech and association in which noninmates would be protected by the First Amendment, is in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, ... U.S. ....., 45 U.S.L.W. 4820 (1977). In *Jones* the Supreme Court affirmed North Carolina Department of Correction regulations which prohibited inmates from soliciting other inmates to join the appellee organization (a prisoners' labor union), barred all meetings of the union, and prohibited delivery of bulk mailings of union publications. Reversing the decision of a three-judge district court, this Court noted (at 4821): "The District Court, we believe, got off on the wrong foot in this case by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." Citing *Pell v. Procunier* and *Procunier v. Martinez* at length, the Court observed "the concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution." And that "[b]ecause the realities of running a penal institution are complex and difficult, we have also recognized the wide ranging deference to be accorded the decisions of prison administrators."

In the instant case testimony was presented to the District Court that to allow press access to the Santa Rita jail on demand

would be extremely disruptive for many reasons, some of which are set forth in the Statement of the Case, *supra* pp. 10-11. For example, it was shown that such access would interfere with the facility's schedule, involving the frequent movement of inmates to and from classes, court, work and meals; would require locking up all inmates upon the entrance of visitors into the facility; would necessitate enhanced security procedures to monitor the flow of visitors and their belongings into the jail; would increase inmate tensions; and would imperil the continued viability of security devices presently extant in the jail. These concerns of the Sheriff were brushed aside by the District Court, as it proceeded with its balancing of those concerns against media demands; and thus there were two errors: first, the balance should have been against the rights of the general public, and second, the District Court in any event failed adequately to defer to the Sheriff's judgment.

B. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER ALTERNATIVE MEANS OF PRISONER-PUBLIC-PRESS COMMUNICATION.

It is apparent that no balancing of the rights of the press and public with those of prison administrators in a factual context such as the one in the case at bar would be complete without scrutiny of alternative channels of communication between Santa Rita inmates and those who seek information from them. In *Pell v. Procunier, supra*, at 823-824 the Supreme Court held as follows:

> In order properly to evaluate the constitutionality of [a regulation restricting the access of the press to state prison inmates] we think that the regulation cannot be considered in isolation but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison. We recognize that there 'may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning' and 'that [the] existence of other altrenatives [does not] extinguis[h] altogether any constitutional interest . . . in this particular form

> of access.' *Kleindienst v. Mandel,* 408 U.S. 753, 765 (1972). But we regard the available 'alternative means of [communications as] a relevant factor' in a case such as this where 'we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests.' "

The Court in *Pell* lists the alternative means of communication which were available:

1) The use of the mail, subject to censorship only through a process offering the prisoner minimum procedural due process safeguards, and

2) The right to receive visits from members of their families, their clergy, attorneys, and friends of prior acquaintance. (The Court in *Pell* pointed out at pg. 825: "If a member of the press fell within any of these categories there is no suggestion that he would not be permitted to visit with an inmate.") This right provides the unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy or attorneys who are permited to visit them at the prison.

Moreover, in light of the statement in *Pell* that both the public and the media had "full opportunities to observe prison conditions", 417 U.S. at 830, the Sheriff in the instant case introduced evidence as to what the public access was in San Quentin, the prison involved in *Pell,* R.T. 75-77, 130. The tour aspects of that access are described in A. 54-59, R.T. 153-155 and briefly stated:

a) consist of a dinner tour,
b) with a one-year waiting period, on which
c) no cameras are permitted, and which
d) provided no contact with inmates, and
e) did not permit entry into the maximum security area.

Finally, the Court in *Pell* observed that the availability of such alternatives is impressive in light of the fact that " '[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a state and a private citizen' and that the 'internal problems of state prisons involve issues . . . peculiarly within state authority and expertise,' " citing *Preiser v Rodriguez,* 411 U.S. 472, 492 (1975).

The District Court's order improperly fails to consider any of the following uncontroverted evidence presented by the Sheriff (and described in detail in the Statement of the Case at pp. 5-11, *supra*):

a) In the Santa Rita maximum security area there is no limitation on the number of letters that an inmate may send or receive, nor is there any limitation on the persons to whom or from whom letters may be sent or received;

b) Although letters to and from members of the general public, including the media, are inspected for contraband, they are not read, and funds for pens, paper and stamps are provided free of charge for inmates who cannot afford them;

c) Anyone, of any age, including members of the press, save those previously confined in a penal institution and minors under 18 (who may accompany an eligible adult), may visit any inmate from 11:30 a.m. to 2:30 p.m. on Sundays;

d) Pre-trial detainees may be visited on Sundays from 11:30 a.m. to 3:30 p.m. and on Tuesdays, Wednesdays and Thursdays from 6:00 p.m. to 8:00 p.m., and may be interviewed by media representatives at other times by prior consent of the detainee, counsel, and the court having jurisdiction;

e) Sentenced inmates may be interviewed upon their release from the facility, the Sheriff having offered to inform the media upon request of the time of departure from Santa Rita and expected arrival in Oakland of the buses carrying released inmates;

f) Maximum security inmates may make unmonitored collect calls without restriction, and other inmates may make telephone calls through the social services officer;

g) Since July 14, 1975, public tours, monthly through December 1975, and semi-monthly thereafter, have been conducted, with no waiting lists since January, 1976.

This extensive availability of alternative means of access to prisoners and information about Santa Rita was not considered by the District Court, despite the admonition contained in *Pell* that regulations such as the one in the instant case could not properly be evaluated except in light of such alternative means of communication. This failure, by itself and together with the other irregularities on the part of the District discussed in this brief, amounts to reversible error.

C. A COMPLETE AND PROPER BALANCING OF THE RIGHTS OF PETITIONER WITH THOSE OF THE PRESS AND GENERAL PUBLIC REQUIRES THE CONCLUSION THAT THE POLICIES CHALLENGED IN THE DISTRICT COURT WERE PROPER AND SHOULD NOT HAVE BEEN DISTURBED.

The standards for review of a government regulation with purportedly adverse effects upon free speech have been reviewed at pages 19-26, *supra*. Application of these standards to the instant case compels the conclusion that despite the District Court's injunction, the means of access to information in and about the Santa Rita jail facility are constitutionally adequate.

It is important to point out that both the press and the public may constitutionally be denied access to government property, not open to the general public, including jails, even when such access is sought in order to seek information or to disseminate it. These observations are contained in *United States v. Farinas*, 448 F.2d 1334, 1338 (2nd Cir. 1971):

> The First Amendment is not a license to impede and disrupt the orderly performance of an essential function of government. *United States v. O'Brien*, 391 U.S. 367 (1968). The public and private interests at stake must be weighed. For instance, the Government's use of a public building for a valid and specific governmental function entitles it to limit the exercise within that building of First Amendment rights to

> the extent that such exercise would interfere with the performance of that function. *Adderley v. Florida*, 385 U.S. 39 (1966). (See also *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1283-1287 (Wright, J.) (D.C. Cir. 1972)[12]; *Asociacion de Trabajadores etc. v. Green Grant Co.*, 518 F.2d 130, 136 fn. 14 (3rd Cir. 1975).)

The exercise of rights connected with First Amendment freedoms may constitutionally be curtailed in government facilities not open to the general public. Limitations upon the gathering of information intended for eventual publication to the public have therefore been upheld where the information sought is contained in courtrooms;[13] government archives;[14] and prisons.[15]

In the instant case testimony presented by the Sheriff to the District Court establishes that there is a substantial jail security interest that is imperiled by press interviews with prisoners and other public access to the jail on request. A tight schedule, involving frequent moving of inmates and detainees to and from meals, classes, courts and work and requiring attendant security for the benefit of visitors, jail personnel, inmates and the general population outside the jail cannot accommodate itself readily to outside access by press or public that is not agreed upon by the Sheriff in advance. The continued effectiveness of facility security devices will also be adversely affected if they are photographed.

A thorough mechanism for monitoring the ingress and egress of the general public is also a necessity where access is extended.

---

12. "It cannot be said that speech may be curtailed every time the state can point to a legitimate governmental interest . . . . But neither can it be true that the constitution permits anyone to do anything at any time so long as he acts in the name of free expression." (472 F.2d at 1283).

13. *Sheppard v. Maxwell, supra; Estes v. Texas, supra; Tribune Review Publishing Company v. Thomas, supra; Manetti v. United States, supra.*

14. *Trimble v. Johnston, supra.*

15. *Pell v. Procunier, supra; Saxbe v. Washington Post Co., supra.*

Tours by advance arrangement allow such monitoring to be planned for. Press or public access upon short notice, by contrast, would require the allocation of jail personnel on a permanent "on call basis."

In light of the reluctance of this Court and other federal courts to intrude unduly into the internal administration of jails, in light of the alternative channels of communication available to the press and public, and to prisoners, and in light of the Sheriff's necessary interest in a rigorous security policy at the jail, it is submitted that the present policy of jail tours and other forms of communication is constitutionally adequate and that the District Court's injunction was improper.

CONCLUSION

For all the foregoing reasons, it is urged that the decisions of the District Court and Court of Appeals should be reversed, and the instant case remanded to the District Court with instructions that the case be dismissed or, in the alternative, retried in accordance with the principles set forth in this brief.

Respectfully submitted,

RICHARD J. MOORE,
County Counsel of the
County of Alameda,
State of California

KELVIN H. BOOTY, JR.
Senior Deputy County Counsel

ADAM SETH FERBER
Deputy County Counsel

(Appendix to Follow)

Appendix

United States Court of Appeals
for the Ninth Circuit

Filed—Dec 24 1975
Emil E. Melfi, Jr. Clerk
U. S. Court of Appeals

No. 75-3643

KQED, INC., et al.,
Plaintiffs-Appellees

vs.

THOMAS L. HOUCHINS, Sheriff of Alameda County,
Defendant-Appellant

ORDER

Before: CHAMBERS and SNEED, Circuit Judges

Upon due consideration, the petition for stay of injunction pending appeal is granted. The injunction appears to exceed the requirements of the First Amendment as interpreted in *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay.

/s/ RICHARD H. CHAMBERS
/s/ JOSEPH T. SNEED
U.S. Circuit Judges

KQED, INC., et al. v.
THOMAS L. HOUCHINS
(Civ. No. C-75-1257-OJC, N.D. Calif.)

9th C/A No. .....

AFFIDAVIT OF THOMAS L. HOUCHINS

State of California }
County of Alameda } ss.

I, THOMAS L. HOUCHINS, being first duly sworn, depose and state that:

1. I am the Sheriff of the County of Alameda, State of California, and am the defendant and appellant in the within action.

2. The public tours of the jail facilities (discussed by the District Court in its Memorandum at p. 3, lines 11-22) were, by action of the Board of Supervisors of Alameda County taken on December 2, 1975, extended for a further period of six months commencing January, 1976. Instead of the tours being monthly, as is the current program, the tours will be twice a month. Members of the public or of the media may go on these public tours. Your affiant has stated to the Board of Supervisors (and to the District Court) his intention to include provisions for the public tours in his departmental budget request for the fiscal year commencing July, 1976. Of course, the action the Board of Supervisors will take on that request is at present unknown to your affiant.

3. In discussing the public tours, the District Court (in its Memorandum at p. 3, lines 26-29) noted certain objections by the media representatives. The only area of significance in the jail not entered by the media was that building called "Little Greystone". The exterior of that building is viewed on the tour. The interior of the building is substantially identical to the other barracks facilities which are included on the tour, and of which a photograph is available. To the extent that the available photographs

have omitted items of interest—and only two "views" were mentioned at the trial as missing—new photographs can and will be taken and made available to the public and press on the same basis as are the other photographs.

4. The preliminary injunction requires your affiant to grant media representatives access to the jail "at reasonable times and hours"; the only express guideline with respect to "reasonableness" stated in the injunction is that your affiant may deny access during "those limited periods when tensions in the jail make such access dangerous." In its Memorandum at p. 5, lines 10-22, the District Court expands upon the same point, requiring specific dangers in fact to exist before access can be denied. There is uncontradicted evidence that jail operations come to a virtual standstill in the presence of a media tour. In Greystone (the maximum security facility), for example, the normal movement of inmates to and from the day rooms, exercise yard, dining halls, and visiting areas, as well as all other activities of the inmates, would cease. The effect is similar throughout the facility. The inconvenience to inmates and to staff is beyond dispute. The cost of staff assistance in moving the inmates and the media representatives, and in protecting the latter, are simply unknown to your affiant at this time. If your affiant is forced to comply with the preliminary injunction, the damage will be done throughout the pendency of the appeal in this Court.

Dated: December 4, 1975

Thomas L. Houchins
THOMAS L. HOUCHINS

SUBSCRIBED AND SWORN to before me
this 4th day of December, 1975
KELVIN H. BOOTY, JR.
Notary Public

December 30, 1975

Honorable Richard H. Chambers
Chief Judge
Honorable Joseph T. Sneed
Circuit Judge
United States Court of Appeals
Ninth Circuit
Seventh and Mission Streets
San Francisco, California

Re: KQED, et al. v. Thomas L. Houchins
U. S. Court of Appeal No. 75-3643

Dear Chief Judge Chambers and Judge Sneed:

Counsel for appellant is in receipt of the undated Motion for Clarification or Amendment of Order Granting Stay, etc., a copy of which was mailed to the undersigned on December 29, 1975. Should the Court decide to hear the Motion, then an appropriate response will be prepared and filed on behalf of appellant.

In the meantime, however, one point should be clarified. Counsel for the plaintiffs-appellees alleges that "KQED will remain totally barred from covering newsworthy stories at the Santa Rita Jail during the pendency of this appeal", so long as the stay order remains in effect. (*Motion*, p. 3) Similarly, it is stated that "the *status quo* is that plaintiff KQED is totally excluded from doing news stories at the County Jail" (*Motion*, p. 5). This is simply incorrect. There are public tours of the Santa Rita facility; these tours are held on the second and fourth Mondays of each month, commencing January, 1976. Up to twenty-five persons may go on any one tour. As of December 29, only sixteen persons had signed up for the January 12 tour, and twelve persons had signed up for the January 26 tour. Accordingly, any representative of

KQED, or of any other news media, may go on those tours merely by placing his name on the list. Moreover, media interviews of pretrial detainees and of sentenced inmates may be conducted now, as before, on the normal basis: Convicts may be interviewed during visiting hours, and pretrial detainees may be interviewed at any time (provided that the consent of the inmate, his counsel, and the court having jurisdiction of his case has first been obtained).

Since discussions of the foregoing are contained in the record before the District Court, and will be involved in the appeal, further comment will be deferred until a more appropriate stage in these proceedings.

Respectfully,
RICHARD J. MOORE
County Counsel

By KELVIN H. BOOTY, JR.
Senior Deputy County Counsel

KHB:st

cc: Honorable Oliver J. Carter
Chief Judge
United States District Court
450 Golden Gate
San Francisco, California

William Bennett Turner
Attorney at Law
Eighth Floor
12 Geary Street
San Francisco, California 94108